

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION



In re:)
)
Heavyquip, Inc.,)
)
Debtor.)

Case No. 01-10623
Chapter 11

JUDGEMENT ENTERED ON SEP 11 2001

)
Perry M. Alexander)
Construction Co.,)
)
Debtor.)

Case No. 01-10624
Chapter 11

ORDER GRANTING CITICAPITAL COMMERCIAL CORPORATION'S
MOTIONS FOR RELIEF FROM STAY OF ACT AGAINST PROPERTY,
OR IN THE ALTERNATIVE FOR ADEQUATE PROTECTION
AND GRANTING IN PART ORIX FINANCIAL SERVICES, INC.'S
MOTION TO COMPEL ASSUMPTION OR REJECTION OF LEASE OR
RELIEF FROM STAY, OR IN THE ALTERNATIVE,
FOR ADEQUATE PROTECTION
AND DENYING PERRY M. ALEXANDER CONSTRUCTION CO.'S
MOTION FOR USE OF CASH COLLATERAL AND
MOTION FOR EMERGENCY USE OF CASH COLLATERAL

This matter is before the court in these two related cases on four motions: 1) a motion for relief from the Section 362 stay filed by CitiCapital Commercial Corporation (CitiCapital) against Heavyquip, Inc.; 2) a motion for relief from the Section 362 stay filed by CitiCapital against and Perry M. Alexander Construction Co. (Alexander Construction); 3) a motion filed by Orix Financial Services, Inc., (Orix) to compel the debtor, Alexander Construction, to assume or reject its lease agreement with Orix pursuant to 11 U.S.C. § 365(d)(2), or for relief from the Section

362 stay; and 4) a motion of the debtor, Alexander Construction, for use of cash collateral and for the emergency use of cash collateral pursuant to 11 U.S.C. § 363(c). For the reasons stated below, the court has concluded that it must grant the motions for relief from stay of CitiCapital and Orix; compel rejection of Alexander Construction's lease with Orix; and deny the Alexander Construction's request to use cash collateral.

Jurisdiction

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b) (2).

2. This matter came before the court after proper notice to all parties, and all parties are properly before this court.

Factual Background

3. The debtors in this case, Heavyquip and Alexander Construction, are affiliated companies both owned in full by W. Thomas Alexander. Alexander Construction is in the business of construction grading and earth and rock removal. Heavyquip is an equipment leasing company that leases exclusively to Alexander Construction.

4. On June 12, 2001, Heavyquip and Alexander Construction filed voluntary bankruptcy petitions under Chapter 11 of the United States Bankruptcy Code. Heavyquip and Alexander Construction have continued to operate as debtors-in-possession pursuant to Section 1107. A trustee has not been appointed.

5. CitiCapital is a secured creditor of Heavyquip. Secured creditors of Alexander Construction include CitiCapital, Orix, and RBC Centura Bank (Centura). Centura's participation in the instant case was limited to filing an Objection to the Debtor's Use of Cash Collateral. Therefore, this Order does not specifically grant any relief to Centura.

6. CitiCapital is a secured creditor of both debtors, Heavyquip and Alexander Construction. Prior to the Chapter 11 filings of these debtors, they entered into three separate transactions with CitiCapital Commercial Corporation:

a) Pursuant to a Security Agreement with Heavyquip dated June 28, 2000, CitiCapital provided funding to Heavyquip for the purchase of fourteen pieces of equipment as detailed on Schedule A of the Security Agreement (attached). CitiCapital filed a UCC-1 Financing Statement perfecting its interest in this collateral.

b) CitiCapital and Heavyquip executed a second Security Agreement on June 28, 2000, in conjunction with Heavyquip's purchase of a Hitachi Model EX200-5 Excavator. A UCC-1 Financing Statement was filed to perfect CitiCapital's interest in this equipment.

c) On June 28, 2000, CitiCapital and Alexander Construction executed a Security Agreement which covered Alexander Construction's purchase of seventeen pieces of

equipment listed on Schedule A of the Security Agreement (attached). CitiCapital perfected its interest in this collateral by filing a UCC-1 Financing Statement.

7. Heavyquip and Alexander Construction are in default on their obligations to CitiCapital for a combined total of approximately \$2,263,000. Post-petition arrearages total approximately \$206,592. The debtors' last payment on the two larger loans from CitiCapital was made on December 29, 2000; this was the third payment on these obligations since June 2000. CitiCapital granted the debtors an extension on their payment obligations in March 2001. However, other than a payment made in April 2001 on the loan to Heavyquip covering the Hitachi, no payments have been made.

8. Maintenance and repairs on the equipment covered by the debtors' three Security Agreements with CitiCapital have been performed only as the equipment has been needed for operations. As a result, most of the equipment is in serious need of repair. In addition, this equipment is depreciating at a rate of 1.5 to 2% per month.

9. The debtors have proposed auctioning twelve pieces of the equipment financed by CitiCapital. Bill King, CitiCapital Vice President and Branch Manager for North Carolina, South Carolina, and Virginia testified that auctioning this equipment as is would bring in \$407,500, exclusive of auction costs.

Further, Mr. King estimated that, with repairs amounting to approximately \$150,000 to \$200,000, an auction of these twelve items should gross \$706,600.

10. The debtors and CitiCapital disagree as to the value of the remaining twenty pieces of equipment that the debtors propose to keep. The debtors maintain that the total value of the equipment is \$1.7 million. CitiCapital argues that, due to the equipment's poor state of repair, its value is approximately \$533,000. If repaired at a cost of \$300,000 to \$350,000, CitiCapital maintains that this equipment would be worth about \$1,080,000. The court finds that the debtors' valuation is overly optimistic and that CitiCapital's valuation is more realistic and reliable.

11. CitiCapital has moved for relief from stay in order to retake possession of its equipment collateral; or, in the alternative, for adequate protection against Heavyquip and Alexander Construction.

12. Orix Financial Services, Inc., is a secured creditor of Alexander Construction.

a) On January 7, 2000, Alexander Construction entered into an equipment lease agreement with Mitchell Distributing Company under which the debtor leased two Komatsu PC300LC-6 Excavators, serial numbers A83361 and A83015 (Komatsus). The terms of the lease provided for

payments over fifty-one months at \$8,991 per month beginning in January 2000. The lease included an option to purchase the Komatsus for \$86,360 if the lease was not in default and Alexander Construction provided notice to Orix at least ninety days prior to the end of the lease term of its intent to exercise the option. The lease agreement was secured by a security interest covering any and all documents, instruments, chattel paper, goods, general intangibles, inventory, machinery, contract rights, equipment, fixtures, accounts, and insurance in which the debtor then or thereafter had any right or interest ("Blanket Collateral").

b) Mitchell Distributing Company subsequently assigned and transferred its rights under the lease to Orix.

c) As additional security on the lease indebtedness, the debtor signed a Security Agreement granting Orix an interest in three 1989 Mack trucks (serial numbers 1M2P195C0KW004970, 1M2P195C2KW004971, 2M2P195C2KC005422); a DF8111 Ford Loader Backhoe (serial number C751430); and a WA100-I Komatsu Loader (serial number 10122) as well as in any and all documents, instruments, chattel paper, goods, general

intangibles, inventory, machinery, contract rights, equipment, fixtures, accounts, insurance and all other property and assets of every kind and nature in which the debtor then or thereafter had a right or interest ("Additional Collateral").

13. Since its Chapter 11 filing, Alexander Construction has rejected its lease with Orix pursuant to 11 U.S.C. § 365(d)(2) and returned the leased Komatsus.

14. Forty of the fifty-one lease payments remain unpaid for an amount due of more than \$359,000.

15. Alexander Construction's obligation to Orix is secured by the Blanket Collateral and the Additional Collateral. Orix has a second lien on the debtor's accounts receivable. With regard to the Additional Collateral, one of the Mack trucks has become inoperable during the post-petition period.

16. Orix has filed a motion for relief from stay so that it can exercise the rights and remedies available with respect to the Blanket Collateral and the Additional Collateral.

17. Alexander Construction has filed a motion requesting the court's permission to use cash collateral and for the immediate emergency use of cash collateral to support business operations pursuant to 11 U.S.C. § 363. The debtor's motion indicates that the use of cash collateral is necessary to facilitate its successful reorganization.

18. Alexander Construction proposes making adequate protection payments to its secured creditors. Under Alexander Construction's proposal, CitiCapital would be granted relief from stay as to the twelve pieces of equipment Heavyquip and Alexander Construction had planned to auction. The debtors also propose that they retain the remaining equipment financed through CitiCapital on condition that adequate protection payments of \$13,000 per month be made to CitiCapital. With regard to Orix, Alexander Construction proposes surrendering the Ford Backhoe and Komatsu Loader and making adequate protection payments of \$1,000 per month. As to Centura Bank, the debtor proposed making two payments each month totaling \$12,775.

19. Heavyquip and Alexander Construction did not present budgets to the court that indicated an ability to make the proposed adequate protection payments. W. Thomas Alexander testified that work is in progress on six outstanding contracts. Bids have been submitted on additional contracts. However, no new contracts have been secured since August 12, 2001.

20. Mr. Alexander testified that of approximately \$1.4 million of the accounts receivable indicated in the debtor's monthly status report, only about \$457,381 is actually due to Alexander Construction. Of that amount, approximately \$250,000 to \$300,000 is collectible. Mr. Alexander testified that

\$178,000 should be received within ten days of the hearing on this matter.

21. The debtor's monthly status report indicates that post-petition payroll taxes have not been paid. In addition, an undetermined amount due in pre-petition payroll taxes has not been paid. Mr. Alexander estimated that weekly payroll taxes total about \$5,000.

22. Alexander Construction has expended cash collateral in the form of post-petition receipts totaling approximately \$173,000 without the consent from its creditors or the prior permission from this court that Section 363(c)(2) requires.

Discussion

A. CitiCapital's entitlement to relief from stay.

23. Section 362(a) of the Bankruptcy Code imposes an automatic stay against creditors of the bankruptcy estate that goes into effect upon the filing of the debtor's bankruptcy petition. Relief from the stay is available if the creditor's interests are not adequately protected, or if the debtor has no equity in the property and it is not necessary to the debtor's effective reorganization. 11 U.S.C. § 362(d)(1)-(2). Section 361 outlines methods for providing adequate protection, including requiring cash payments to prevent a decrease in the value of the secured creditor's interest in the property subject to the stay. 11 U.S.C. § 361(1). Accordingly, the debtor must demonstrate an

ability to make adequate protection payments. In the alternative, the debtor must show that there is equity in the property and that it is necessary to the debtor's ability to reorganize.

24. In the instant case, Heavyquip and Alexander Construction have not met either of these burdens. Despite the optimism expressed by Mr. Alexander, there has been no showing that the Heavyquip and Alexander Construction have the necessary cash flow to make the adequate protection payments he has proposed. On the contrary, it is undisputed that Alexander Construction has been unable to pay both pre- and post-petition payroll taxes at a time when it was not making any payments to CitiCapital. Therefore, it is unlikely that Alexander Construction would be capable of paying its secured creditors interest and depreciation on the property at issue. Moreover, there has been no showing of equity in the machinery that Heavyquip and Alexander Construction propose to keep in order to effectuate their reorganization. The equipment is not being properly maintained and continues to depreciate through use or neglect. For these reasons, it is appropriate to grant CitiCapital's motions for relief from stay pursuant to Section 362(d).

25. The court is aware that it is early in this reorganization case and that the debtor normally is entitled to

some "breathing room" in order to reorganize. See In re C.F. Simonin's Sons, Inc., 28 B.R. 707, 711 (Bankr. E.D.N.C. 1983) (holding that, where the bankruptcy case was less than a month old, it was too early to conclude that there was no prospect of reorganization). However, in this case, relief from stay is merited at this stage because the debtors cannot adequately protect their creditors' interests, and because it appears that there is no prospect for a successful reorganization. Even on the debtors' optimistic assumptions, there is a shortfall of about fifty percent in their ability to provide adequate protection payments. Moreover, the debtors demonstrated no prospect for any improvement of its business in a reasonable time period. The debtors' history consists of huge losses from operations, renegotiation of credit agreements, and default. The evidence of the debtors' current operations post-petition is that: 1) the equipment is not being maintained; 2) payroll taxes have not been paid; and 3) cash collateral has been used unlawfully. The debtors' forecast for future operations is speculative at best--and, even then, inadequate to successfully reorganize.

B. Orix's entitlement to relief from stay.

26. Orix is also entitled to relief from the automatic stay under Section 362(d)(1). Again, Alexander Construction has not demonstrated that funding is available to make adequate

protection payments to its creditors, including Orix. However, relief will be limited to the three Mack trucks, the Ford Backhoe, and the Komatsu Loader covered by the Additional Collateral agreement with Alexander Construction. Because the court did not hear sufficient evidence as to the value of the collateral subject to Orix's Security Agreements with Alexander Construction, it is appropriate to order this limited relief. Orix may renew its motion should it fail to realize all that it is owed from the disposition of this collateral.

C. Alexander Construction Co.'s request to use cash collateral.

27. Alexander Construction has requested authority to use the cash collected on its accounts receivable. Those proceeds, however, are subject to the interests of its creditors. Section 363(a) of the Code defines these proceeds as cash collateral. Under Section 363(c), the use of cash collateral is prohibited without the consent of creditors or without court authorization. Orix and Centura have both objected to the Alexander Construction's request to use cash collateral. Therefore, this court must determine whether authorization to do so should be granted.

28. Prior to authorizing the use of cash collateral, the court must find that the interests of secured creditors are adequately protected. In re American Sweeteners, Inc., 2000 WL

1010582, at *3 (Bankr. E.D. Pa. 2000); Simonin, 28 B.R. at 711. Section 363(o) of the Code places the burden of proving that the creditor's interests are adequately protected on the debtor. A high degree of uncertainty regarding the debtor's ability to effectively reorganize is a factor to consider in evaluating whether the secured creditor's interests are adequately protected. American Sweeteners, 2000 WL 1010582, at *4. In Simonin, Judge Small noted that determining whether there was a reasonable chance of reorganization was preliminary to considering whether the creditor's interests would be adequately protected if the debtor was permitted to use cash collateral. 28 B.R. at 711. If there is little possibility of the debtor's reorganizing, there is no point in jeopardizing the creditor's cash collateral. Id. Conversely, if a debtor presents evidence that an effective reorganization is reasonably probable and that arrears can be cured in a timely manner, the creditor's interests will be deemed to be adequately protected. In re Hagel Partnership Limited, 40 B.R. 821, 823 (Bankr. D.C. 1984)

29. Here, the debtor filed for Chapter 11 protection ten weeks ago. In that time, the debtor has expended significant amounts of cash collateral without the requisite consent of creditors. Authorization to use cash collateral was sought from this court only after the fact. At the same time, basic expenses such as payroll taxes have gone unpaid.

32. The debtor has failed to meet its burden under Section 363(o). The debtor's prospects for reorganization are very uncertain. The debtor's budget is based on business it does not have. Contracts for additional work may be forthcoming, but none have been secured. The debtor's accounts receivable have been declining, and cash is not being replenished at the rate it has been expended. In addition, the debtor's budget projections are not sufficient to cover adequate protection payments of interest and depreciation. In short, the debtor's ability to reorganize and, therefore, to provide adequate protection for its creditors, is speculative at best.

Conclusion

For the reasons set out above, the court has concluded that it must grant relief from stay as requested by CitiCapital and Orix and deny Alexander Construction's request to use cash collateral. The court has considered the matter of the ten-day stay of Bankruptcy Rule 4001(a)(3) and has concluded that stay should apply in these cases as provided by the rule. This Order, along with a separate Judgment, will be filed in both cases captioned above.

It is therefore ORDERED that:

- a) CitiCapital Commercial Corporation's (f/k/a Associates Commercial Corporation) Motion for Relief from Stay of Act Against Property, or In the Alternative, for Adequate Protection against the debtor, Heavyquip, Inc., is granted;
- b) CitiCapital Commercial Corporation's (f/k/a Associates Commercial Corporation) Motion for Relief from Stay of Act

Against Property, or In the Alternative, for Adequate Protection against the debtor, Perry M. Alexander Construction Co., is granted;

c) Orix Financial Services, Inc.'s, Motion to Compel Assumption or Rejection of Lease, or Relief from Stay, or In the Alternative, for Adequate Protection against the debtor, Perry M. Alexander Construction Co., is granted in part, only as to the three 1989 Mack trucks, the Ford Backhoe, and the Komatsu Loader covered by the Additional Collateral agreement with Perry M. Alexander Construction Co. (Further relief is denied at this time without prejudice to renewal of the motion later);

d) Perry M. Alexander Construction Co.'s Motion for Cash Collateral and Motion for Emergency Use of Cash Collateral is denied.

e) Bankruptcy Rule 4001(a)(3) is applicable to these cases.



George R. Hodges
United States Bankruptcy Judge

HEAVYQUIP, INC. SCHEDULE A

One (1) Moxxy Model MT30X Articulated Hauler, S/N: 353655
One (1) Moxxy Model MT30X Articulated Hauler, S/N: 353573
One (1) Caterpillar Model 621E Motor Scraper, S/N: 6AB01002
One (1) Caterpillar Model 12G Motor Grader, S/N: 61M08012
One (1) Caterpillar Model 621E Motor Scraper, S/N: 6AB01216
One (1) Caterpillar Model D8N Crawler Tractor, S/N: 9TC06043
One (1) VME Volvo Model L70 Wheel Loader, S/N: L070V61338
One (1) Komatsu Model PC200LC-5 Hydraulic Excavator, S/N: A70766
One (1) Dresser Model TD8E Crawler Tractor, S/N: 83046
One (1) Bomag Model BW172PD Vibratory Roller, S/N: 101520210177
One (1) Samsung Model SE280LC Hydraulic Excavator, S/N: 1419
One (1) Dresser Model TD7G Crawler Tractor, S/N: 5362
One (1) Caterpillar Model 436B Loader Backhoe, S/N: 7FL00680
One (1) Caterpillar Model D6H Series II Crawler Tractor, S/N: 3ZF06021
One (1) Hitachi EX200-5 Hydraulic Excavator, S/N: 1495PD087661

Together with all present and future attachments, accessories, exchanges, parts, repairs, and additions thereto, and all chattel paper, documents, general intangibles, instruments, accounts and contract rights now existing or hereafter arising with respect to any thereof, and all cash and non-cash proceeds of any of the foregoing.

**PERRY M. ALEXANDER CONSTRUCTION COMPANY
SCHEDULE A**

One (1) Mack Model CH613 Tractor Truck, S/N: 1M2AA13Y3RW035548
One (1) Caterpillar Model 621F Motor Scraper, S/N: 4SK00070
One (1) Caterpillar Model 621F Motor Scraper, S/N: 4SK00069
One (1) Komatsu Model PC300LC-6 Hydraulic Excavator, S/N: A81316
One (1) Caterpillar Model 12G Motor Grader, S/N: 61M15898
One (1) Samsung Model SE350LC Hydraulic Excavator, S/N: 090
One (1) Caterpillar Model 621E Motor Scraper, S/N: 6AB00969
One (1) Caterpillar Model D8L Crawler Tractor, S/N: 53Y01785
One (1) Caterpillar Model D6D Crawler Tractor, S/N: 04X09017
One (1) Caterpillar Model D4H Crawler Tractor, S/N: 8PB02928
One (1) Caterpillar Model D7G Crawler Tractor, S/N: 92V08855
One (1) Caterpillar Model 416 Loader Backhoe, S/N: 5PC12402
One (1) Caterpillar Model 815 Compactor, S/N: 91P00504
One (1) Caterpillar Model D6C Crawler Tractor, S/N: 10K12525
One (1) Caterpillar Model D5B Crawler Tractor, S/N: 25X01222
One (1) Caterpillar Model D6H Crawler Tractor, S/N: 4RC01910
One (1) Komatsu Model PC200LC-5 Hydraulic Excavator, S/N: A49392

Complete with all present and future attachments, accessories, exchanges, replacements, repairs and additions thereto.